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## THE REGULATION OF SPERM BANKS AND FERTILITY DOCTORS: A CRY FOR PROPHYLACTIC MEASURES

Reproductive technology is no longer a proposition for the future.<sup>1</sup> The increasing number of infertile couples who desire to become parents have influenced medical experts to move techniques of artificial human reproduction from the realm of science fiction to clinical reality.<sup>2</sup> With the introduction of artificial insemination (AI) in the United States, doctors, lawyers, and ethicists have examined the implications of reproductive techniques. This essentially entails "playing God."<sup>3</sup> Unfortunately, lawmakers, for the most part, have not heeded calls for prophylactic measures addressing the problems that may arise from reproductive technologies.<sup>4</sup> This lack of legislative guidance has resulted in novel legal issues, including claims of negli-

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1. Kathryn V. Lorio, *Alternative Means of Reproduction: Virgin Territory for Legislation*, 44 LA. L. REV. 1641, 1642 (1984). See generally George P. Smith, II & Roberto Iraola, *Sexuality, Privacy and the New Biology*, 67 MARQ. L. REV. 263 (1984).

2. Terra Ziporyn, 'Artificial' Human Reproduction Poses Medical, Social Concerns, 255 JAMA 13, 13 (1986).

3. DIETER GIESEN, INTERNATIONAL MEDICAL MALPRACTICE LAW, §§ 50, 52, at 664, 674 (1988); see also Jeffrey M. Shaman, *Legal Aspects of Artificial Insemination*, 18 J. FAM. L. 331, 347-50 (1979-80) (discussing AI by donor and its medical malpractice implications); George P. Smith, II, *Through A Test Tube Darkly: Artificial Insemination And The Law*, 67 MICH. L. REV. 127, 128 (1968) (discussing the legal, social, cultural, religious, emotional, and psychological issues raised by AI).

4. Scientific technology is redefining the traditional family structure, but federal and state laws fail to reflect these advances. Elizabeth Neuffer, *New Birth Technology Leaves Legal Void*, BOSTON GLOBE, Jan. 30, 1990, Metro Sec., at 1. Only a few laws and regulations address the new reproductive technologies. Ethics Committee of the Am. Fertility Soc'y, *Ethical Considerations of the New Reproductive Technologies*, 53 FERTILITY & STERILITY No. 6, at 7S (Supp. 2 1990) [hereinafter Ethics Committee]. Usually, legislatures enact statutes to regulate situations such as adoption, fetal research, abortion, and paternity; courts apply these statutes to new reproductive technology. *Id.*

Nevertheless, a 1987 survey of sperm banks conducted by the Office of Technology Assessment (OTA) indicated that most banks favor "[e]stablishing national standards for donor insemination." See OFFICE OF TECHNOLOGY ASSESSMENT, ARTIFICIAL INSEMINATION 10 (Background Paper, Summary of the 1987 Survey). Of the 15 sperm banks surveyed, 14 supported national standards for donor screening, 13 supported record-keeping standards, and 11 favored standards for recipient screening. *Id.* The sperm banks also favored involvement by national medical societies and federal public health agencies to assure the safety and quality of AI practice rather than using peer review organizations. *Id.* The study noted that:

So far only the health departments of New York, Michigan, Illinois[,] and Indiana license and inspect all banks doing business in their states. And neither the state rules nor regulations being considered by the federal Food and Drug Administration

gence against both sperm banking facilities and persons who perform AI.<sup>5</sup>

AI is one of the most popular and socially accepted methods of assisted human reproduction.<sup>6</sup> However, as with all reproductive sciences, new techniques, medicines, and procedures are often used in medical practice before legislatures and society subject them to careful, measured consideration.<sup>7</sup> While Georgia was the first state to enact a statute recognizing AI by donor (AID) in 1964,<sup>8</sup> this statute only addressed the legitimacy of AID children. Legislation addressing insemination procedures themselves were not introduced until the mid-1980s. Unfortunately, these laws remain limited in both scope and content.<sup>9</sup>

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call for monitoring the sperm itself—where it comes from, where it goes, how well it performs.

Benedict Carey, *Sperm, Inc.*, IN HEALTH, July-Aug. 1991, at 51, 53. Presently, some sperm banks maintain records on their own volition. *Id.*; see also George P. Smith, II, *The Razor's Edge of Human Bonding: Artificial Fathers and Surrogate Mothers*, 5 W. NEW ENG. L. REV. 639, 644, 648 (1982) (detailing problems with sperm banks and AI resulting from the lack of quality controls).

5. Several lawsuits have been brought by plaintiffs claiming wrongful insemination. See, e.g., *Doe v. Cryo-V New York, Inc.*, N.Y. L.J., Sept. 10, 1990, at 22 (discussing the suit brought by a child against sperm bank which allegedly caused mix-up of sperm used to impregnate mother; child sued for emotional damages caused by not knowing his biological father's identity); Edward A. Adams, *Sperm Donor Suit Raises Novel Tort Issues*, N.Y. L.J., March 8, 1990, at 1 (reporting the case of *Skolnick v. Idant Laboratories, Inc.* which the parties later settled, see *infra* notes 63 and 64). For a lawsuit alleging negligence in the storage of the plaintiff's sperm, see Tawn Parent, *Dead Sperm Prompts Breach of Contract Suit*, 11 INDIANAPOLIS BUS. J., Apr. 16-22, 1990, at 8B, discussed *infra* note 65.

In addition to problems linked to wrongful insemination suits, other problems have occurred. A fertility doctor in Alexandria, Virginia used his own sperm to impregnate a number of his patients, which resulted in the births of at least seven children. *Fertility Doctor Accused of Using His Own Sperm*, WASH. POST, Nov. 20, 1991, at A1. The doctor was convicted of 52 felonies and is the subject of several civil suits. *The Fertility Doctor's Private Practices*, NEWSWEEK, Mar. 16, 1992, at 62. This case presents a prime example of the consequences that result when doctors fail to adhere to the American Fertility Society (AFS) guidelines and use fresh sperm because "the procedure had a better possibility of success." *Fertility Doctor Accused of Using His Own Sperm*, *supra*, at A38.

6. AI by donor is the most common infertility treatment. William Hines & Judith Randal, *Artificial Insemination and AIDS: The Risk of Infection Is Small But Worrisome*, WASH. POST, Jan. 5, 1988, Health Magazine, at Z16. See generally Judith Gaines, *A Scandal of Artificial Insemination*, N.Y. TIMES, Oct. 7, 1990, Good Health Magazine, at 23 (discussing AI in the United States in the 1990s).

7. GIESEN, *supra* note 3, § 52, at 674.

8. GA. CODE ANN. § 19-7-21 (Michie 1991). The Georgia statute creates a legal presumption of legitimacy for AID children when the mother and her husband give their written consent to the procedure. *Id.* Since the enactment of this statute, other states have adopted similar legislation favoring the legitimization of AID children. Shaman, *supra* note 3, at 336.

9. Currently, only a few jurisdictions regulate the donation of sperm. In Ohio, the donor of fresh semen must undergo a physical examination, provide a medical and genetic history, and be tested for blood type and RH factor. OHIO REV. CODE ANN. § 3111.33(B)(1) (Anderson 1988). The donor must also undergo further laboratory studies, which may include, but

As the AI process moves into the 1990s, it continues to generate novel issues. Legal questions range from the extent and sufficiency of quality control mechanisms monitoring insemination and donations to the ramifications of the uncertainty regarding the long-term psychological effects on sperm donors, recipients, and children conceived through the procedure.<sup>10</sup> Additional questions concern the legal duties of doctors and technicians to prevent the mix-up of sperm samples during insemination and to inform their

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are not limited to, screening for venereal disease, cytomegalo, hepatitis, kem-zyme, Tay-Sachs, sickle-cell anemia, ureaplasma, HTLV-III [HIV], and chlamydia, along with karyotyping and GC culture. *Id.* Indiana law requires donors to be tested for syphilis, hepatitis B surface antigen, and HIV, including a 180 day quarantine period for HIV retesting. IND. CODE § 16-8-7.5-6 to -.5-7 (Supp. 1991). Idaho and Oregon prohibit a person who knows that he has a genetic defect or venereal disease from donating sperm. However, neither state addresses the use of fresh versus frozen sperm. IDAHO CODE § 39-5404 (1985); OR. REV. STAT. § 677.370 (1989). Statutes enacted in Delaware, Idaho, Illinois, North Carolina, and Rhode Island require the donor to be screened for Acquired Immune Deficiency Syndrome (AIDS). DEL. CODE ANN. tit. 16, § 2801 (Supp. 1991); IDAHO CODE § 39-5408 (Supp. 1991); ILL. ANN. STAT. ch. 127, para. 55.45 (Smith-Hurd Supp. 1991); N.C. GEN. STAT. § 130A-148(c) (Supp. 1991); R.I. GEN. LAWS § 23-1-38 (Supp. 1989). New Hampshire grants physicians the discretion to test semen for AIDS. N.H. REV. STAT. ANN. § 141-F:5 (II) (1990). Florida does not require AIDS screening for donors but mandates that doctors warn potential recipients of donated sperm of the risks of contracting AIDS. FLA. STAT. ANN. § 381.6105(12) (West Supp. 1991); *see also* Ethics Committee, *supra* note 4, at 11S-12S.

Prompted by the fear of AIDS, New York issued new state health regulations in 1989 which provide a variety of safeguards for AI. First, they mandate that sperm banks be licensed, and second, that all donors be subjected to at least two AIDS tests before their sperm is used. *N.Y. Bans Gays, Intravenous Drug Users As Sperm Donors*, L.A. TIMES, Oct. 4, 1989, at 5. As a result of these regulations, New York became the first state to statutorily define sperm donor eligibility. Sam H. Verhovek, *New York, in Move to Bar AIDS, Puts New Limits on Sperm Banks*, N.Y. TIMES, Oct. 4, 1989, at A1. Under the regulations, New York sperm banks may not accept sperm donated by gay men or intravenous drug users. *Id.* In addition, the regulations make it illegal for New York sperm banks to dispense fresh sperm. *Id.* at B6. These new regulations may provide stronger support for a cause of action by a woman or baby who contracts the AIDS virus from an anonymous gay donor. *Id.* at B6. These regulations also impose strict record-keeping requirements, but health department officials say the provisions will be further strengthened in light of the alleged mix-up in the *Skolnick* case. Robin Schatz, *Sperm "MixUp" Spurs Debate; Questioning Safeguards, Regulations*, NEWSDAY (City Edition), Mar. 11, 1990, at 3; *see also infra* notes 63 and 64.

Most states do not have formal rules regarding sperm donor eligibility, relying instead on guidelines established by medical organizations. Verhovek, *supra*, at A1. Georgia is the only state that addresses the potential liability of doctors performing AI. GA. CODE ANN. § 43.34-42 (Michie 1991). The Georgia law relieves doctors who perform AI with the consent of the husband and wife from civil liability for any adverse results. *Id.* However, doctors may be liable for negligent administration or performance of AID. *Id.*

10. Ethics Committee, *supra* note 4 (discussing the guidelines sperm bank facilities should impose and problems discovered in the facilities). *See generally* ANNETTE BARAN & REUBEN PANNOR, *LETHAL SECRETS; THE SHOCKING CONSEQUENCES AND UNSOLVED PROBLEMS OF ARTIFICIAL INSEMINATION* (1989) (interviewing donors, families involved in AI, and children born as a result of new reproductive procedures).

patients of the complications that may be encountered.<sup>11</sup> Moreover, courts will confront issues of whether the sperm banks and physicians guarantee their product, whether anonymity is promised to recipients and donors, and whether sperm banks owe donors the duty of physician-patient confidentiality.<sup>12</sup> Therefore, legislatures must decide if there are circumstances which preclude anonymity or whether certain state interests warrant a breach of the confidential relationship between sperm banks, physicians, and patients.

Part I of this Comment reviews the background of AI and the procedures and technologies used in the process. Part II focuses on AI conflicts, analyzing cases pertaining to a physician's duty under the common law of negligence. Additionally, this Comment discusses whether courts should impose strict liability on sperm banks. The Comment advocates that clinics should introduce reasonable quality controls, and it examines proposed standards. Part III of the Comment examines the issues legislatures must consider and resolve before promulgating statutes that regulate AI. An overview of the statutes and standards that exist in foreign countries is also presented, indicating a trend towards regulation of the procedures employed by sperm banking facilities.

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11. In the past, some doctors may have withheld information or given an inaccurate representation of information to their patients. Ethics Committee, *supra* note 4, at 76S. The House Committee on Government Operations noted: "The lack of effective treatment for infertility has made it possible for health care professionals to exploit infertile couples. . . . Physicians misrepresent their credentials to make themselves appear to be infertility specialists [when they are not]." COMM. ON GOVT. OPERATIONS, INFERTILITY IN AMERICA: WHY IS THE FEDERAL GOVERNMENT IGNORING A MAJOR HEALTH PROBLEM?, H.R. REP. NO. 389, 101st Cong., 1st Sess. 26 (1989). In 1988, the OTA reported that a majority of in vitro fertilization (IVF) clinics did not inform patients of their failure to produce live births, despite the fact that patients paid thousands of dollars for the treatment. *Id.* Regulation is warranted to prevent further misrepresentations about the efficacy of treatment and the expertise of those who administer the procedures. *Id.*

The AFS recommends that doctors inform their patients of the guidelines for standard practices and that clinics disclose the fact that they may be offering new reproductive technologies. Ethics Committee, *supra* note 4, at 77S. Additionally,

prospective patients should be fully aware of the risks and benefits of the proposed procedures, as well as given the pregnancy and abortion rates and the live birth rates of that particular practice or clinic. Patients should be informed of up-to-date success rates and feasibility of alternative procedures.

*Id.* Most importantly, the clinics should give patients information that will help them evaluate the quality of the services provided. *Id.* With the increased use of cryopreserved sperm, it is also the sperm banks' responsibility to inform the client about the reduced survival rates of sperm samples when they are frozen and then thawed and evaluated for their fertilization capacity. *Id.* at 42S. The sperm bank should also inform the client or couple of the consequences of long-term sperm storage. *Id.*

12. See Joseph D. Piorkowski, Jr., Note, *Between a Rock and a Hard Place: AIDS and the Conflicting Physician's Duties of Preventing Disease Transmission and Safeguarding Confidentiality*, 76 GEO. L.J. 169, 192-202 (1987).

This Comment neither supports nor opposes the imposition of liability on sperm banks for wrongful insemination; it simply offers an objective review of the case law and legal issues relevant to a cause of action for wrongful insemination or similar claims. This Comment demonstrates that sperm bank facilities are in a vulnerable position—in the absence of statutory guidelines, they are potential defendants in lawsuits for wrongful insemination, transmission of disease, and breach of privacy rights or duties of confidentiality. This Comment concludes that state legislatures must address the legal duties of those performing inseminations and delineate the responsibilities of sperm storage facilities in order to effectively respond to reproductive trends in modern society.

### I. ARTIFICIAL INSEMINATION

AI is now a widely accepted, nonexperimental medical procedure.<sup>13</sup> In a relatively simple and inexpensive process, doctors place semen from a husband (AIH) or a donor (AID) in a syringe and inject it into a woman's reproductive tract.<sup>14</sup> The semen is produced by masturbation.<sup>15</sup> Because the exact moment of ovulation in a woman cannot be pinpointed, the insemination process is repeated for several consecutive days.<sup>16</sup> Successful fertilization occurs in seventy to seventy-five percent of the cases.<sup>17</sup> Most couples prefer AIH because it provides a biological link between husband and child. AID is necessary, however, if the husband is infertile,<sup>18</sup> if there is an RH incompatibility between the husband and wife,<sup>19</sup> or if the husband has a

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13. The Hebraic Talmud of the second century first recognized artificial insemination. William P. Hummel & Luther M. Talbert, *Current Management of a Donor Insemination Program*, 51 FERTILITY & STERILITY No. 6, at 919 (1989). However, it was not until 1770 that the first documented human insemination was successfully performed in London. *Id.* In the United States, the procedure was not introduced until 1890, and even then it was performed with great secrecy. *Id.* In 1953, two scientists demonstrated that human sperm could be frozen and thawed for insemination, resulting in the birth of a normal child. This process is called cryopreservation. Ethics Committee, *supra* note 4, at 41S. Today, the total number of births from AI is approximately 30,000 world-wide. Marilyn Chase, *Sperm Banks Thrive Amid Debate Over Medical and Ethical Issues*, WALL ST. J., Apr. 2, 1987, at 31. More than one-half of these births occur in the United States. *Id.*

14. GIESEN, *supra* note 3, § 50, at 630.

15. Ruth A. Crowley et al., Commentary, *Development in the Law: Surrogate Parenthood Contracts After Baby "M,"* 24 WILLAMETTE L. REV., 1053, 1105 (1988).

16. *Id.*

17. *Id.*

18. *Id.* There are also techniques which mix the infertile husband's sperm with that of a donor. While it is often explained as a procedure to strengthen sperm counts, its real purpose is to offer the husband some hope that he is the biological father in the event of conception. See GEORGE P. SMITH, II, GENETICS, ETHICS AND THE LAW 107 n.2 (1981).

19. RH factors are chemical substances found in the red blood cells. Crowley et al., *supra* note 15, at 1105 & n.39. When a husband is RH positive and the wife is RH negative, their

hereditary disorder.<sup>20</sup> Additionally, men may preserve semen samples for reasons such as anticipated impairment of their fertility by chemotherapy<sup>21</sup> or as a precautionary measure should they otherwise become unavailable.<sup>22</sup>

The sperm used in AI is either fresh, donated at the time of the insemination, or frozen and stored at a cryobank.<sup>23</sup> Techniques for freezing and banking sperm donations were developed in the early 1950s;<sup>24</sup> however, fresh semen was favored because the rate of successful fertilization was thought to be greater.<sup>25</sup> Initially, medical centers performed sperm banking, storing sperm for relatively immediate medical use.<sup>26</sup> Today, sperm is stored in cryobanking facilities located throughout the world.<sup>27</sup> AI has become a feasible reproductive alternative because anyone may use cryobank-

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union produces an RH positive child. *Id.* The RH negative mother produces anti-RH substances which can destroy the red blood cells of the RH positive fetus. *Id.* This creates a life threatening condition for the newborn child who will die within days unless she is given new blood. *Id.*

20. George J. Annas, *Fathers Anonymous: Beyond the Best Interests of the Sperm Donor*, 14 FAM. L. Q. 1, 5 (1984).

21. Ethics Committee, *supra* note 4, at 41S. "Cryopreservation of semen . . . [may be used] whenever impairment of gonadal function is anticipated, whether permanent (chemotherapy, radiation therapy, orchidectomy for malignant disease) or temporary (inability to deliver a semen sample on demand for in vitro fertilization . . . ) or . . . for convenience, . . . [when] the husband [is] unavailable[e] . . . ." *Id.*

22. Many soldiers sent to the Persian Gulf had sperm frozen and stored indefinitely in liquid nitrogen as a precautionary measure. *Just in Case*, PARADE MAG., Mar. 31, 1991, at 22.

23. Cryobanks are storage facilities in which containers of semen are frozen using liquid nitrogen and stored indefinitely at a temperature of -196.5 degrees centigrade. Crowley et al., *supra* note 15, at 1106. It has been generally accepted that cryopreserved semen reduces pregnancy rates by as much as 10% to 15% when compared with fresh semen because the sperm have decreased motility and a shortened life span. Hummel & Talbert, *supra* note 13, at 925. However, the results of a recent random study comparing fresh and frozen semen indicated that maintaining constant cryopreservation and insemination techniques resulted in equal fertilization rates regardless of whether the sperm was fresh or frozen. *Id.* at 925-26. More than 28,000 births have occurred following insemination with cryobanked sperm. Ziporyn, *supra* note 2, at 13-15. Of these, approximately 500 donors were husbands—the remainder were not related to the recipient. *Id.* Births have even been reported in cases in which sperm was stored for more than 12 years. *Id.*

24. The first successful freezing of human semen at dry ice temperatures was reported in 1953. See Ethics Committee, *supra* note 4, at 41S.

25. Hummel & Talbert, *supra* note 13, at 926; see *supra* note 23. Fresh sperm still may be used because the thawing process can destroy 40% to 60% of the sperm. One of the drawbacks of using fresh semen is that it must be inseminated within one day of donation. Robin Schatz, *2nd Sperm MixUp is Alleged*, NEWSDAY (City Edition), Apr. 27, 1990, at 6.

26. JOSEPH FLETCHER, *THE ETHICS OF GENETIC CONTROL: ENDING REPRODUCTIVE ROULETTE* 68 (1988).

27. Currently, there are approximately 25 commercial and university based sperm banks in the United States. Ziporyn, *supra* note 2, at 13. In addition, there are about 16 national banks in France, 12 regional centers in Australia, and an estimated 20 banks in Austria, Belgium, Brazil, Canada, Colombia, Denmark, England, Greece, Ireland, Italy, Israel, Japan, Norway, Spain, Sweden, Switzerland, and Taiwan. *Id.*

ing services, and sperm may be stored indefinitely.<sup>28</sup> The ability to freeze sperm has led to the development of a viable commercial enterprise with sperm banks operating as long-term storage facilities virtually free from state licensing or regulation.<sup>29</sup>

Recent rulings promulgated by the Food and Drug Administration (FDA) and guidelines established by the American Fertility Society (AFS) have assured the continued existence of cryobanks by suggesting that only frozen semen be used for AI.<sup>30</sup> The primary reason for this suggestion is that preserving sperm allows time for it to be carefully screened for diseases.<sup>31</sup> The AFS guidelines also suggest that physicians should: 1) provide consent forms to couples describing the risk of infectious diseases associated with the use of fresh semen; 2) maintain permanent records including "both identifiable and nonidentifiable genetic screening information" while preserving donor anonymity; 3) limit donor use to ten offspring; and 4) perform scrupulous screening of semen samples.<sup>32</sup>

The development of cryobanks has also allowed a greater number of spousal inseminations to be performed. If a husband's sperm count is low, he can collect, consolidate, and freeze semen specimens. From these specimens, the sperm can be separated and used in concentrated form for insemination.<sup>33</sup> Couples may also freeze and store sperm to permit conception after a husband's death or as protection against future sterility, which may result from work place or environmental hazards, chemotherapy, or other sterility-causing treatments.<sup>34</sup>

Skeptics within the medical profession doubt the potency of frozen sperm and continue to use fresh semen despite the risk of infection.<sup>35</sup> They argue

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28. See *supra* notes 21-25.

29. Walter Wadlington, *Artificial Conception: The Challenge for Family Law*, 69 VA. L. REV. 465, 468 (1983). One commentator noted, "The increasingly popular technique—which has spawned a \$164 million industry with 11,000 private physicians, 400 sperm banks[,] and well over 200 fertility centers—is responsible for the birth of 30,000 babies annually." Gaines, *supra* note 6, at 23.

30. FDA and AFS guidelines suggest terminating all fresh semen inseminations and quarantining frozen semen at least six months. See Ethics Committee, *supra* note 4, at 44S; see also American Fertility Soc'y, *New Guidelines for the Use of Semen Donor Insemination: 1990*, 53 FERTILITY & STERILITY No. 3 at 4S (Supp. 1 1990).

31. Proper screening can be performed only when a semen sample is quarantined and retested for sexually transmitted diseases after the potential incubation period has passed. Ethics Committee, *supra* note 4, at 44S.

32. *Id.* at 45S.

33. *Id.* at 41S-42S (discussing AI with a husband's sperm).

34. *Id.* at 41S; see *supra* notes 21 and 22.

35. The OTA completed a study in 1987 regarding artificial insemination practices in the United States and found that 22% of those performing donor inseminations rely exclusively on fresh semen. OFFICE OF TECHNOLOGY ASSESSMENT, *supra* note 4, at 10. See also Charles



that promulgation of safety standards will further exacerbate the shortage of donor sperm and result in inflationary prices.<sup>36</sup> Notwithstanding such criticisms, the Public Health Association and the AFS remain committed to their recommendations that only frozen semen be used for AI.<sup>37</sup> They reason that it is impossible to test fresh sperm for recent exposure to the AIDS virus because adequate HIV testing dictates that semen be frozen, quarantined, and retested after three to six months.<sup>38</sup>

## II. AID CONFLICTS: PAST, PRESENT, AND FUTURE

### A. Past AI Conflicts

The United States Supreme Court has indicated strong support for the procreative liberty of married persons<sup>39</sup> but has never addressed the right of married or unmarried persons to employ noncoital reproductive techniques.<sup>40</sup> However, commentators claim that the sphere of procreative lib-

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Marwick, *Artificial Insemination Faces Regulation, Testing of Donor Semen, Other Measures*, 260 JAMA 1339, 1340 (1988). It is not known whether the recommendation to use frozen semen has had any effect on physicians who generally use fresh semen. *Id.*

36. See Diane Beukle, *Threat of AIDS Both a Plus and a Challenge for Roseville Sperm Bank*, MINNEAPOLIS-ST. PAUL CITY BUS., May 30, 1988, at 1; see also Ivor Davis, *Posterity Insurance: AIDS, Infertility & Medical Advances Have Given Sperm Banks a Run on Their Frozen Assets*, CHI. TRIB., Apr. 26, 1988, at C1; Mark S. Frankel, *The Public Policy Dimensions of Artificial Insemination and Human-Semen CryoBanking* 37 (Dec. 1973) (unpublished manuscript, on file with Kennedy Center for Bioethics, Georgetown University, Washington, D.C.) (asserting that the high and varying costs of semen banking indicate a need for health insurance to absorb financial burden on consumers). But see Peter J. Ferrara, *Give Consumers Choice in Health-Care Reform*, USA TODAY, June 17, 1991, at 8A (noting that Massachusetts already requires health insurance policies sold in the state to cover sperm bank deposits).

37. See generally Carey, *supra* note 4, at 53. Voluntary guidelines promulgated by the American Association of Tissue Banks (AATB) and the AFS do not guarantee that a sperm sample has been frozen long enough for the donor to be tested for HIV or the effectiveness of the sperm. *Id.* On the other hand, if the sperm is too effective (*i.e.* the sperm is so good that doctors tend to use it repeatedly) the number of inseminations for which it is used must be monitored. *Id.*

38. OFFICE OF TECHNOLOGY ASSESSMENT, *supra* note 4, at 10. In fact, doctors have used HIV-infected semen in AI procedures. Gregory Byrne, *Artificial Insemination Report Prompts Call for Regulation*, NEWS & COMMENT, 895, 895 (1988). In the United States, infected semen has been used at least twice, although there are no confirmed reports of women having been infected through donated semen. *Id.* Four Australian women, however, are carrying the virus after they were apparently infected by donated sperm. *Id.*; see also Jane Southward, *AIDS Women: Mother to Sue Sydney Sperm Bank*, SUN HERALD, Aug. 19, 1990, at 3.

39. See, e.g., *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (holding that state prohibition of the use of contraceptives by unmarried persons violates their right to procreate); *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) (holding that state prohibition of the use of contraceptives violates a married couple's right to procreate); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (holding that involuntary sterilization of prisoners violated their procreative liberty); see also Ethics Committee, *supra* note 4, at 2S.

40. Ethics Committee, *supra* note 4, at 3S.

erty encompasses a couple's right to employ new techniques that assist reproduction.<sup>41</sup> Furthermore, absent a compelling state interest, such as a serious health risk to children or parents, states cannot substantially impair the right of married couples to use reproductive technology.<sup>42</sup>

Cases concerning AIH or AID have generally not focused on the procreative liberty interest but instead have involved various issues of family law such as divorce,<sup>43</sup> paternity,<sup>44</sup> illegitimacy,<sup>45</sup> consensual questions,<sup>46</sup> and

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41. *Id.* at 2S, 4S-5S. The committee stated: "[T]here is good reason to expect courts to recognize a constitutional right to procreate by noncoital and donor assisted means." *Id.* at 2S.

42. See *id.* at 5S; see also Note, *Reproductive Technology and the Procreation Rights of the Unmarried*, 98 HARV. L. REV. 669, 682 (1985) (explaining that if procedures were found to pose a substantial health risk to either children or parents, the state should restrict the technique); *Roe v. Wade*, 410 U.S. 113, 149 (1973) (holding that a state can restrict inherently hazardous medical procedures). To date, however, reproductive technology does not appear to have raised such health problems. Procedures such as AIH are virtually identical to "natural" procreation; there is no greater threat of physical injury to either the children or their parents in AIH than that risked in natural procreation. Note, *supra*, at 682. One student commentator asserts: "A state health interest in screening sperm donors for genetic defects could not justify outlawing artificial insemination. Such a law would be unnecessarily restrictive because the state could simply require screening." *Id.* at 682-83 n.75.

43. See, e.g., *Wife Tells Veteran of "Test Tube" Baby: He Wins Divorce*, CHI. SUN, Feb. 10, 1945, at 13 (discussing case in which court awarded the husband a divorce from his wife despite the fact that his grounds for divorce were allegations of adultery because his wife gave birth to a child conceived by artificial insemination).

44. See, e.g., *Jhordan C. v. Mary K.*, 224 Cal. Rptr. 530, 537-38 (Ct. App. 1986) (granting donor paternity rights because the AI was completed without a physician's involvement in violation of California statute); *People v. Sorenson*, 437 P.2d 495, 501 (Cal. 1968) (holding husband liable for support of child conceived by AI and noting that public policy favors legitimacy—in absence of legislation prohibiting artificial insemination, offspring will not be considered illegitimate); *K.S. v. G.S.*, 440 A.2d 64 (N.J. Super. Ct. Ch. Div. 1981) (holding that husband was child's lawful father despite his claim that he had withdrawn his consent); *In re Adoption of Anonymous*, 345 N.Y.S.2d 430 (Sur. Ct. 1973) (holding that a child born of consensual AID during a valid marriage is legitimate and entitled to the rights and privileges of naturally conceived child).

45. See, e.g., *People v. Sorenson*, 437 P.2d 495 (Cal. 1968) (holding husband liable for support of child conceived by AI and noting that public policy favors legitimacy and thus, in absence of legislation prohibiting artificial insemination, offspring will be considered legitimate); *Doornbos v. Doornbos*, 139 N.E.2d 844 (Ill. App. Ct. 1956) (not published in full) (holding child born out of wedlock and therefore illegitimate when the husband consented to wife's artificial insemination but failed to adopt the resultant child); *In re Adoption of Anonymous*, 345 N.Y.S.2d 430 (Sur. Ct. 1973) (declaring child born of consensual AID during a valid marriage legitimate and entitled to rights and privileges of naturally conceived child); *Anonymous v. Anonymous*, 246 N.Y.S.2d 835 (Sup. Ct. 1964) (holding husband liable for child support and declaring child illegitimate despite husband's consent to AID); *Gursky v. Gursky*, 242 N.Y.S.2d 406 (Sup. Ct. 1963) (ruling that husband consented to insemination and thus was estopped from claiming lack of liability for child's support, despite child's illegitimacy); *People ex rel. Abajian v. Dennett*, 184 N.Y.S.2d 178 (Sup. Ct. 1958) (estopping a wife from claiming that her husband was not her children's father because they were conceived by artificial insemination).

visitation rights.<sup>47</sup> Only a handful of cases have directly addressed the effects of AI. In one early case, a French court addressed the issue of who owned donated sperm; the court held that the widow owned the semen that her late husband had stored in a sperm bank.<sup>48</sup>

Despite quality control problems within sperm banks,<sup>49</sup> few cases have alleged negligence by the banks for wrongful insemination or ineffective sperm.<sup>50</sup> Similarly, there have been few suits against sperm banks for claims of medical malpractice or the use of genetically defective semen. In 1982, the issue of whether doctors are obligated to screen donors and maintain records which facilitate subsequent donor identification and location went before the Nevada Supreme Court.<sup>51</sup> The plaintiff claimed that a genetic mismatch caused by the defendant physician's failure to properly screen the

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46. See, e.g., *Anonymous v. Anonymous*, 246 N.Y.S.2d 835 (Sup. Ct. 1964) (holding that a husband was liable for child support and declaring the child illegitimate despite husband's consent to AID); *Gursky v. Gursky*, 242 N.Y.S.2d 406 (Sup. Ct. 1963) (ruling that husband consented to insemination and thus was estopped from claiming lack of liability for child's support, despite child's illegitimacy); *Strnad v. Strnad*, 78 N.Y.S.2d 390 (Sup. Ct. 1948) (considering husband's visitation rights to child conceived by AI during marriage with the husband's consent).

47. See Judith L. B. Rice, Comment, *The Need for Statutes Regulating Artificial Insemination By Donors*, 46 OHIO ST. L.J. 1055, 1058-62 (1985) (discussing current AI cases); see, e.g., *Jhordan C. v. Mary K.*, 224 Cal. Rptr. 530, 536-38 (Ct. App. 1986) (granting donor visitation rights and establishing donor's paternity when AI was completed without the help of a physician in violation of California statute); *C.M. v. C.C.*, 377 A.2d 821 (N.J. Juv. & Dom. Rel. Ct. 1977) (granting donor parental rights despite the lack of marriage and holding child illegitimate); *Strnad v. Strnad*, 78 N.Y.S.2d 390 (Sup. Ct. 1948) (considering husband's visitation rights to child conceived by artificial insemination during marriage and with husband's consent); *People ex rel. Abajian v. Dennett*, 184 N.Y.S.2d 178 (Sup. Ct. 1958) (estopping wife from claiming husband was not children's father because they were created by artificial insemination).

48. Anthony M. DeStefano, *Sperm Suit Raises Array of Legal Issues*, *NEWSDAY* (City Edition), Mar. 10, 1990, at 11. The wife claimed that she was her husband's heir and entitled under French law to the return of his property. *Id.* The sperm bank asserted that her husband's intentions were unclear because he was not married at the time he made the deposit. *Id.* The French court ruled for the wife, stating that it appeared her husband's intention was to have his wife be the mother of his child. *Id.*

49. Gaines, *supra* note 6, at 23; Neuffer, *supra* note 4, at 1. Differing policies among hospitals and clinics leave millions of couples who turn to reproductive technologies confused about the procedures used, hospital or clinic policies, or the source of the sperm. *Id.*; see also Ethics Committee, *supra* note 4, at 7S-12S, 44S.

50. See *Doe v. Cryo-V New York, Inc.*, N.Y. L.J., Sept. 10, 1990, at 22 (discussing suit brought by a child against sperm bank which allegedly caused mix-up in sperm used to inseminate mother; child sued for emotional damages caused by not knowing the identity of his biological father); Adams, *supra* note 5, at 1. For further review of the cases, see *infra* notes 63 and 64.

51. Katherine Bishop, *The Brave New World of Baby Making*, *CAL. LAW.*, Aug. 1986, at 39 (discussing the Nevada case of *Fitzgerald v. Rucckl*, No. 11433 (Nev. 1982)).

donor's sperm resulted in the death of his child.<sup>52</sup> The court dismissed the case on other grounds and never reached the negligence issue.<sup>53</sup> Nevertheless, as the number of AI births in the United States continues to increase,<sup>54</sup> similar cases are likely to arise.

In 1987, a California court confronted another type of issue involving a sperm bank.<sup>55</sup> In the case, the plaintiff sought to compel the bank to disclose the donor's identity. The court refused to order disclosure, despite the semen recipient's claim that the sperm was infected with a virus.<sup>56</sup> Explaining his decision, the judge stated that, although the donor's right of privacy was not necessarily absolute, disclosure required "a more compelling showing of need and relevancy."<sup>57</sup>

### B. AI Conflicts of the 1990s

Very few studies have examined the AI process or the procedures employed by sperm banking facilities.<sup>58</sup> However, the results in one study<sup>59</sup> indicate that many doctors who perform AID are careless with respect to testing donors for genetic defects.<sup>60</sup> Confronted by statistical evidence of negligence and recent problems detected in sperm banks, state legislatures have scrambled to enact legislation to curtail these problems.<sup>61</sup>

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52. *Id.*

53. *Id.*

54. Approximately 30,000 babies are born annually as a result of AI. Further, more than 80,000 women attempt to have children using the sperm of men they do not know. See Gaines, *supra* note 6, at 23.

55. *Lawsuit Over Infection: Settled by Sperm Bank*, L.A. TIMES, Nov. 2, 1990, at B9. The plaintiff received \$450,000 after settling out of court with a clinic after she became infected with a herpes-like cytomegalovirus from AI with tainted sperm from a bank in Santa Ana, California.

56. John Spano, *Sperm Bank Wins Right to Withhold Identity of Donor*, L.A. TIMES, Oct. 16, 1987, Metro Sec., at 1.

57. *Id.*

58. The use of AI creates ethical, moral, and legal obligations which conflict with some of the goals of research scientists; therefore, it is imperative to impose regulations. GIESEN, *supra* note 3, § 50, at 632; Carey, *supra* note 4, at 52-53 (noting that for every child born from reproductive technologies, countless embryos have been destroyed).

59. Martin Curie-Cohen et al., *Current Practice of Artificial Insemination by Donor in the United States*, 300 NEW ENG. J. MED. 585, 588 (1979).

60. *Id.*; see also Ziporyn, *supra* note 2, at 13-15. The risk of a woman contracting venereal disease or bearing a child with genetic defects can be minimized by using frozen sperm and quarantine measures; however, not all clinics follow these procedures. *Id.* Additionally, other physicians claim that they neglect to perform genetic testing because the majority of donors are medical students—the presumption being that medical students would not lie about being healthy. ANDREWS, *infra* note 68, at 169. This argument is illogical; leaving a donor to recognize a genetic disorder in his family, whether he is a medical student or not, does not protect the child. Ziporyn, *supra* note 2, at 13.

61. A sample of legislation pending in the states includes: S. 302, 1990, Ind. Bill Tracking

One of the problems legislatures are addressing is "wandering sperm."<sup>62</sup> Wandering sperm was the subject of two recent New York controversies in which women alleged that due to the negligent actions of the sperm banks or the physician administering their inseminations, or both, they were impregnated with the wrong sperm.<sup>63</sup> Critics attribute the occurrence of such

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Statenet, available in LEXIS, State Library, Intrck File (removing requirement of bacteria and virus testing of semen; requiring state board of health to adopt rules for testing donated semen for communicable disease); S. 281, 1990, Md. Bill Tracking Statenet, available in LEXIS, State Library, Mdtck File (requiring facilities to have written procedures for storage, maintenance, and custody of cryopreserved embryos); H.R. 5270, 1991, Mass. Bill Tracking Statenet, available in LEXIS, State Library, Matck File (licensing and regulation of sperm banks and IVF clinics).

Additionally, Senator Albert Gore (D-Tenn.) proposed federal legislation that would establish a national data bank to store the medical and genetic histories of anonymous donors. Byrne, *supra* note 38, at 895. The legislation is designed to protect donor anonymity while allowing children born through AI to access it. *Id.* Representative Ron Wyden (D-Or.) proposed legislation requiring that infertility clinics be accredited for each procedure they perform and that they report their success rates. Shari Roan, *Ethics and the Science of Birth*, L.A. TIMES, Dec. 8, 1990, at A38. He hoped that this legislation would provide a basis for resolving legal and ethical issues associated with the use of reproductive technology. *Id.* While this bill was tabled in 1990, it is evidence that legislatures recognize the need to resolve these issues. *Id.*

62. Wandering sperm refers to a situation in which a woman receives sperm that is neither her husband's nor the donor's for which she contracted. DeStefano, *supra* note 48, at 11.

63. In *Doe v. Cryo-V New York, Inc.*, N.Y. L.J., Sept. 10, 1990, at 22, a child conceived by AI and her parents sued Cryo-V, a New York sperm bank, its processing unit, the University Fertility Center of Research, and three attending obstetrician-gynecologists. Edward A. Adams, *Court Rejects Child's Claim in Alleged Sperm Bank Mix-Up*, N.Y. L.J., Sept. 10, 1990, at 2. They claimed that the husband's sperm was not used in the insemination although he had deposited it in the bank. *Id.* The couple sought \$30 million in damages. Schatz, *supra* note 25, at 6. The semen was processed by a company related to the Cryo-V sperm bank and located at the same address. *Id.* The complaint alleged that in March 1988 Jane Doe received semen from Cryo-V purported to be from her husband. *Doe*, N.Y. L.J., Sept. 10, 1990, at 22. Three days after the child was born, Jane Doe learned that the child did not have the same blood type as her or her husband and therefore could not be genetically related to her husband. Adams, *supra*, at 2.

In the second suit, *Skolnick v. Idant Laboratories, Inc.*, a Queens woman sued a sperm bank, Idant Laboratories, Inc. and Doctor Melnick of Manhattan's Advanced Fertility Services, claiming that she was wrongfully inseminated with sperm that was not her late husband's. Adams, *supra* note 5, at 1. Obvious physical differences prompted the mother to question whether the correct sperm was used because, although the couple is white, their three-year-old daughter is apparently black. *Id.* DNA tests conducted on the child and semen samples from the plaintiff's late husband indicated that his sperm was not used in the insemination. *Id.* The *Skolnick* case is significant because it is the first documented instance of a sperm mix-up. Schatz, *supra* note 9, at 3. However, *Skolnick* never reached the court because the parties settled out of court on July 31, 1991. Ronald Sullivan, *Sperm Mix-Up Lawsuit Is Settled*, N.Y. TIMES, Aug. 1, 1991, at B4. The sperm bank paid the mother \$95,000 and the child \$5,000 in return for settling the suit. *Id.* The doctor who performed the insemination paid the mother \$300,000 in settlement of claims against him. *Id.* *Skolnick* is important because, despite being

sperm mix-ups to the lack of regulatory oversight in the fertility business.<sup>64</sup>

In addition to negligence actions for wrongful insemination, plaintiffs may have a cause of action for breach of contract if laboratories that store sperm samples fail to maintain their promised viability.<sup>65</sup> Furthermore, other actions alleging negligence or strict liability are inevitable because many doctors fail to properly screen both sperm donors and AI recipients for infectious diseases.<sup>66</sup>

### C. Future AI Negligence Actions

#### 1. Wrongful Life, Wrongful Birth

The problems in the two New York suits<sup>67</sup> suggest that courts will continue to confront novel tort issues arising from the use of AI. One such claim involves a cause of action for wrongful life resulting from wrongful insemination. To succeed in an action for wrongful life, the parties harmed

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settled out of court, it focused concern on the problems inherent in sperm laboratories and donor insemination procedures.

64. Schatz, *supra* note 25, at 6. The New York cases involve mix-ups that allegedly occurred because the doctors' offices and laboratories operated without regulatory oversight. Health department records indicated that Dr. Melnick failed to apply for the appropriate state permit allowing him to perform semen banking. Robin Schatz, *Fertility Tests Curbed; Firm in Sperm-Mix-Up Suit Gets City Order*, *NEWSDAY* (Nassau & Suffolk Edition), Mar. 23, 1990, at 49. Additionally, three inspections conducted after the mix-up occurred revealed serious deficiencies. The inspections disclosed that: the bank failed to conduct the tests on donated semen mandated by New York regulations; there was no documentation by the bank indicating that the semen had been quarantined for the required six-month period prior to its release; and the bank failed to maintain proper records. Robin Schatz, *State Closes Sperm Bank in Mixup Suit; Agency Also Warns Four Others in City*, *NEWSDAY*, Apr. 28, 1990, at 4 [hereinafter Schatz, *State Closes Sperm Bank*]. Inspectors also found a semen sample belonging to Skolnick's deceased husband. Robin Schatz, *New Questions in Sperm Case: Semen Sample Found in Office*, *NEWSDAY* (City Edition), Apr. 22, 1990, at 4 [hereinafter Schatz, *New Questions in Sperm Case*]. However, because of missing and incomplete records, the inspectors were unable to determine whether the sample had been untouched since donation or whether it was merely excess sperm from the AI. Schatz, *State Closes Sperm Bank*, *supra*, at 4. Specific deficiencies noted in the inspection included: the impossibility of locating sperm in storage banks for anonymous donors; the impossibility of identifying semen samples designated for specific patients; the failure to label the exterior of sample containers in the semen tank; and the disintegration of paper tags used to label the sperm in the liquid nitrogen. Schatz, *New Questions in Sperm Case*, *supra*, at 4.

65. Parent, *supra* note 5, at 8B. In 1990, an Indiana man filed suit against a local laboratory alleging negligence and breach of contract due to his "lost ability to have children." *Id.* The individual deposited sperm in Follas Laboratories in March 1985 before undergoing surgery that rendered him sterile. *Id.* He was told at the time of donation that the samples would survive for at least 10 years. Four years later, however, he received a letter from the company informing him that the sperm was no longer viable. *Id.* As a result, he filed suit alleging laboratory negligence and breach of contract. *Id.*

66. OFFICE OF TECHNOLOGY ASSESSMENT, *supra* note 4, at 9-10.

67. See *supra* notes 63 and 64.

by the wrongful insemination must prove that the negligence resulted in the birth of a child who was so impaired that it would have been better for that child to have never been born.<sup>68</sup> Because of the difficulty of proof, many states preclude claims for wrongful life by either judicial or legislative decisions.<sup>69</sup> Only three states have recognized a cause of action for wrongful

68. See Timothy J. Dawe, Note, *Wrongful Life: Time for a "Day in Court,"* 51 OHIO ST. L.J. 473, 475-76 (1990) (noting that the tort of wrongful life is controversial and innovative despite the fact that it follows traditional patterns of negligence in that the elements of duty, breach, causation, and injury must be alleged and proved). State legislatures have not addressed whether doctors who perform AI can be held liable for wrongful life. Georgia is the only state whose legislature has addressed the liability of the doctors who perform AI with the consent of the husband and wife. LORI B. ANDREWS, *NEW CONCEPTIONS* 192 (1987). The Georgia law states that doctors "shall be relieved of civil liability to the couple of the child for the results, except that doctors are liable for negligent administration or performance of AID." *Id.* This law is limited to inseminations when the husband and wife consent; thus, it does not address liability for every situation in which an insemination is performed. *Id.* Furthermore, doctors do not warrant that "every AID child is free of genetic defects." *Id.* at 193. Their responsibility is similar to any other pregnancy, *i.e.* they must advise the couple about screening for genetic disorders and amniocentesis. *Id.* Similarly, the couple or the child may have a right to sue when the child is born with a serious defect stemming from the doctor's negligence. *Id.* Courts have prohibited admitting into evidence forms signed by couples which release the doctor from liability. *Id.*

69. New York and other jurisdictions have rejected a common-law cause of action for wrongful life. Adams, *supra* note 5, at 3.

[A "wrongful life" suit is] an action for damages against the doctor by the child. A child who is the product of assisted conception may be subject to physical, psychological, and legal difficulty or disability . . . "Wrongful life" suits have been allowed in only three states because courts are not able to determine whether it is better to have been born under certain circumstances . . . than not to have been born at all. Recent laws in Minnesota, South Dakota, and Utah . . . prohibit lawsuits charging wrongful life where abortion would have eliminated the damages . . . [However], [i]n Michigan a child collected for dental damage resulting from the antibiotic tetracycline, and in California a suit was brought on behalf of a child with Tay-Sachs disease. This case involved erroneous laboratory results that had indicated the parents were not Tay-Sachs carriers, . . . [and the suit claimed that the child] had a right to be born healthy or not at all. Other states which now accept such suits include Washington, New Jersey, and Pennsylvania.

ELIZABETH NOBLE, *HAVING YOUR BABY BY DONOR INSEMINATION* 256-57 (1987).

The jurisdictions whose common law rejects wrongful life actions are: *Phillips v. United States*, 508 F. Supp. 537 (D. S.C. 1980) (construing South Carolina law); *Elliot v. Brown*, 361 So. 2d 546 (Ala. 1978); *Walker v. Mart*, 790 P.2d 735 (Ariz. 1990); *Lininger v. Eisenbaum*, 764 P.2d 1202 (Colo. 1988); *Garrison v. Medical Ctr. of Del., Inc.*, 581 A.2d 288 (Del. 1989); *Moores v. Lucas*, 405 So. 2d 1022 (Fla. Dist. Ct. App. 1981); *Blake v. Cruz*, 698 P.2d 315 (Idaho 1985); *Siemieniec v. Lutheran Gen. Hosp.*, 512 N.E.2d 691 (Ill. 1987); *Bruggeman v. Schimke*, 718 P.2d 635 (Kan. 1986); *Schork v. Huber*, 648 S.W.2d 861 (Ky. 1983); *Viccaro v. Milunsky*, 551 N.E.2d 8 (Mass. 1990); *Proffitt v. Bartolo*, 412 N.W.2d 232 (Mich. Ct. App. 1987), *app. denied*, 430 Mich. 860 (1988); *Wilson v. Kuenzi*, 751 S.W.2d 741 (Mo. 1988), *cert. denied*, 488 U.S. 893 (1988); *Smith v. Cote*, 513 A.2d 341 (N.H. 1986); *Becker v. Schwartz*, 386 N.E.2d 807 (N.Y. 1978); *Azzolino v. Dingfelder*, 337 S.E.2d 528 (N.C. 1985), *cert. denied*, 479 U.S. 835 (1986); *Ellis v. Sherman*, 515 A.2d 1327 (Pa. 1986); *Nelson v. Krusen*, 678

life.<sup>70</sup>

Even if a claim for wrongful life fails, a court may allow the parents to recover damages for wrongful birth.<sup>71</sup> In a wrongful birth action, the plaintiffs must prove that the child's existence is impaired because of the defendant's conduct.<sup>72</sup> Some courts rebut claims of impairment by employing a sanctity of life rationale which expresses a preference for the continued existence of life regardless of defects.<sup>73</sup> This rationale reflects a basic belief that nonexistence is never a valid alternative to an impaired existence.<sup>74</sup>

## 2. *Prima Facie Negligence Case*

Regardless of whether a cause of action for wrongful insemination is based on a claim of wrongful life, wrongful birth, or any other tort theory, the plaintiff must prove the elements of negligence: duty, breach of duty, causation, and injury.<sup>75</sup> Because few cases have alleged negligence by sperm

S.W.2d 918 (Tex. 1984); *James G. v. Caserta*, 332 S.E.2d 872 (W. Va. 1985); *Dumer v. St. Michael's Hosp.*, 233 N.W.2d 372 (Wis. 1975).

The following jurisdictions have enacted statutes prohibiting a cause of action for wrongful life: IND. CODE ANN. § 34-1-1-11 (Burns Supp. 1990); ME. REV. STAT. ANN. tit. 24, § 2931 (West 1990); MINN. STAT. ANN. § 145.424 (West 1989); MO. ANN. STAT. § 188.130-1 (Vernon Supp. 1991); N.D. CENT. CODE § 32-03-43 (Supp. 1991); S.D. CODIFIED LAWS ANN. § 21-55-1 (1987); UTAH CODE ANN. § 78-11-24 (1987 & Supp. 1991).

70. The three states are California, New Jersey, and Washington. See *Turpin v. Sortini*, 643 P.2d 954 (Cal. 1982); *Procanik v. Cillo*, 478 A.2d 755 (N.J. 1984); *Harbeson v. Parke-Davis, Inc.*, 656 P.2d 483 (Wash. 1983). The status of wrongful life claims is unsettled in Louisiana and Indiana. *Dawe*, *supra* note 68, at 474 n.8.

71. See *Dawe*, *supra* note 68, at 476 n.16. *Dawe* states: "Several courts have recognized a claim for 'wrongful birth' brought by the parents of an impaired child, despite their rejection of the impaired child's own claim for wrongful life." *Id.*; see, e.g., *Berman v. Allan*, 404 A.2d 8 (N.J. 1979); see also Elizabeth F. Collins, *An Overview and Analysis: Prenatal Torts, Preconception Torts, Wrongful Life, Wrongful Death, and Wrongful Birth: Time For a New Framework*, 22 J. FAM. L. 677, 690-700 (1983-84). Actions for wrongful birth are more common and more successful than those for wrongful life because the claims allege negligence by the physician during the prenatal period for providing parents with incorrect information or failing to inform parents about genetic screening. *NOBLE*, *supra* note 69, at 257.

72. See, e.g., *Berman v. Allan*, 404 A.2d 8 (N.J. 1979). In a wrongful insemination case, the plaintiff must prove that the child's existence was impaired as a result of the physician using the wrong sperm. This may also raise an issue of contractual liability between the donor and the sperm bank—whether there is a breach of contract for which the sperm bank is liable when the wrong sperm is in fact disseminated. See *supra* note 64.

73. The *Berman* Court found in favor of the infant plaintiff, but simultaneously stated: "We cannot, however, say that she would have been better off had she never been brought into the world." 404 A.2d at 13; see also *Doe v. Cryo-V New York, Inc.*, N.Y. L.J., Sept. 10, 1990, at 22 (ruling that a two-year-old child, allegedly born because of a sperm bank mix-up could not recover emotional damages resulting from not knowing the identity of his biological father).

74. *Dawe*, *supra* note 68, at 475.

75. See W. PAGE KEATON ET AL., *PROSSER AND KEETON ON THE LAW OF TORTS* § 56,



banks, courts confronting this issue may analogize it to an action brought against a blood bank that supplies tainted blood.<sup>76</sup>

Medical professionals accused of malpractice are held to a higher standard of care than are nonprofessionals in general negligence actions. The standard of care is determined by examining the conduct of the medical profession in similar circumstances.<sup>77</sup> As one commentator notes, "A physician is under a duty to use that degree of care and skill which is expected of a reasonably competent practitioner in the same class to which he belongs, acting in the same or similar circumstances."<sup>78</sup> A standard of care is difficult to define in the field of cryobanking because it is a new medical field that lacks established guidelines and regulatory oversight.<sup>79</sup> The only consistent source of standards are guidelines promulgated by the AFS and the American Association of Tissue Banks (AATB).<sup>80</sup> The problem inherent in the use of these guidelines is that although adherence to these standards is strongly suggested, it remains a voluntary decision.<sup>81</sup>

In addition to establishing the standard by which the court will judge the defendant's conduct and proving that a breach of that standard occurred, the plaintiff in a sperm bank negligence case must also prove causation—but for the negligence of the defendant, the parents would have chosen either to not conceive the child or to terminate the pregnancy had they realized the

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at 373-75 (5th ed. 1984); *see also* DOUGLAS J. CUSINE, *NEW REPRODUCTIVE TECHNIQUES: A LEGAL PERSPECTIVE* 104 (1988).

76. *See* Frankel, *supra* note 36, at 14; *see also* Adams, *supra* note 63, at 2. For blood cases, *see* Jones v. Miles Labs., Inc., 887 F.2d 1576 (11th Cir. Ga. 1989), *aff'g* 700 F. Supp. 1127 (N.D. Ga. 1988) (finding no negligence on part of plasma manufacturer in suit by a hemophiliac suffering from AIDS alleging that the plasma contained the HIV virus); Kaiser v. Memorial Blood Ctr., 721 F. Supp. 1073 (D. Minn. 1989) (alleging blood center was negligent in choosing donors, screening blood, and failing to warn); Kozup v. Georgetown Univ., 663 F. Supp. 1048 (D. D.C. 1987) (finding neither the hospital nor blood bank negligent in transfusing blood to an infant who later contracted AIDS; holding blood bank to community standard of care, rather than unique super standard).

77. *See, e.g.,* Morrison v. MacNamara, 407 A.2d 555, 561 (D.C. 1979) (holding doctor to the standard of care of medical community existing at the time of injury).

78. CUSINE, *supra* note 75, at 104.

79. Although many hospitals and IVF clinics have established internal ethics committees and legal counsels, hospital and clinic policies differ considerably. This leaves couples who turn to reproductive technology very confused about the standards of care employed. Neuffer, *supra* note 4, at 1. *See also* NOBLE, *supra* note 69, at 255 (explaining that holding a physician who assists in AI to the standard of care observed by other qualified medical specialists creates a catch-22 situation because there is no agreed upon standard of care in the practice of donor insemination).

80. *See generally*, American Fertility Soc'y, *supra* note 30; ANDREWS, *supra* note 68, at 168.

81. ANDREWS, *supra* note 68, at 168. Andrews notes: "The AFS and AATB guidelines provide a solid basis for avoiding genetic mishaps with AID. Unfortunately the majority of AID practitioners do not follow these standards." *Id.*

wrong sperm was used.<sup>82</sup> However, if the plaintiff establishes causation in fact, there may be an intervening cause which prevents imposing liability on the defendant.<sup>83</sup> Furthermore, a sperm bank may be able to avoid liability for negligent failure to prevent the spread of disease or a wrongful birth if it successfully asserts a defense of contributory negligence or assumption of risk.

Once a woman proves that she was inseminated with sperm from a man other than the intended donor, the identity of the negligent party must be determined.<sup>84</sup> DNA tests can determine whether the errant sperm wandered at the insemination facility or whether the lab which processed the semen delivered the wrong specimen.<sup>85</sup> Under a joint liability theory such as the one used in California, the plaintiff need not prove precisely which party is at fault; she need only show that she was inseminated with the wrong sperm. In contrast, New York requires that a plaintiff prove that either the lab or the doctor was responsible for the mistake.<sup>86</sup>

The final element that the plaintiff must prove in a negligence action is injury.<sup>87</sup> One type of injury in a wrongful insemination case is the mental anguish suffered by the parents when they determine that no genetic link between the father and the child exists.<sup>88</sup> A second form of injury may result when a mother is unable to love a child conceived from wandering sperm as much as a child that might have been produced with her husband's sperm.<sup>89</sup> Such a claim, however, places the mother-plaintiff in a "less than entirely sympathetic" position with a judge or jury.<sup>90</sup> A third type of injury arises when the husband has died prior to the birth of a child conceived from his own sperm.<sup>91</sup> In such a case, the plaintiff may be able to recover on the theory of lost opportunity, namely that the couple wanted to have a child while the husband was still alive and when the actions of the sperm bank or physician make this impossible, the plaintiff should be compensated for the

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82. NOBLE, *supra* note 69, at 256.

83. *Id.*

84. Adams, *supra* note 5, at 3.

85. *Id.* (citing Columbia University School of Law Professor David W. Leebron).

86. *Id.* *Skolnick v. Idant Laboratories, Inc.*, did not address this issue. The judge assigned to the case urged settlement and the parties agreed. See *supra* notes 63 and 64.

87. Adams, *supra* note 5, at 3. (citing David Gould, a Manhattan solo practitioner who served as counsel to the plaintiff-mother in *Doe v. Idant Laboratories, Inc.*, discussed *supra* notes 63 and 64); see also Adams, *supra* note 63 (discussing the case of *Skolnick v. Idant Laboratories, Inc.*).

88. Adams, *supra* note 5, at 3.

89. *Id.*

90. *Id.*

91. *Id.*

lost opportunity.<sup>92</sup>

### 3. *The Strict Liability Alternative*

Even if a plaintiff cannot prove that a physician or sperm bank was negligent, courts may apply strict liability for selling genetically defective semen to a patient.<sup>93</sup> A donor may also be liable if the relationship between him and the doctor or sperm bank is that of a buyer and seller in a contract of sale.<sup>94</sup> No court has ruled on such a case; however, if this issue should arise, courts may analogize defective semen donations to providing defective blood donations.<sup>95</sup> Several courts have imposed strict liability on blood banks for providing defective blood, reasoning that because defective blood is inherently dangerous, the seller is strictly liable for any harm the blood causes.<sup>96</sup> Whether the transfer of blood by a blood bank constitutes a sale is a separate issue. Some courts have held that the transfer of blood by a blood bank to a hospital is a sale because "the transaction is purely commercial and involves only the one commodity."<sup>97</sup> In contrast, commentators argue that the transfer of blood from a hospital to a patient is not a sale because blood is a necessity.<sup>98</sup>

Likewise, when defective semen is involved, the transaction between the doctor and patient may not constitute a sale because semen is necessary for performing AI.<sup>99</sup> Nevertheless, the transfer of semen from donor to doctor or sperm bank may be a sale because no other service is performed.<sup>100</sup> In either case, if the transfer of semen is considered a sale of goods, the contractual obligations of the parties must be carefully delineated.<sup>101</sup> Failure of the doctor to make payment or failure of the donor to deliver nondefective semen would constitute a breach of the sales contract.<sup>102</sup> If the donor provides defective semen he may also be held in breach of the implied warranty of merchantability.<sup>103</sup>

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92. *Id.*

93. No court has decided a case involving defective sperm and the strict liability theory; however, it is conceivable that this type of case could arise in the future.

94. CUSINE, *supra* note 75, at 95.

95. *Id.*

96. Shaman, *supra* note 3, at 347.

97. CUSINE, *supra* note 75, at 95.

98. *Id.*

99. *Id.* But see NOBLE, *supra* note 69, at 140 (asserting that an analogy between blood and semen donation is not necessary).

100. CUSINE, *supra* note 75, at 95.

101. *Id.* When the transfer of semen is considered a sale of goods, Article 2 of the Uniform Commercial Code applies. See generally U.C.C. §§ 2-101 to -725.

102. *Id.* at 96.

103. *Id.* See, e.g., U.C.C. § 2-314. The child conceived would not be able to sue the donor

Many states have statutorily prohibited the imposition of strict liability in cases involving defective blood.<sup>104</sup> Similarly, state legislators may preclude the imposition of strict liability for the use of genetically defective sperm. In determining whether sperm is a vital product which warrants statutory protection similar to blood and blood products, each state must balance the demand for sperm, the inability to test for certain genetic defects, and the seriousness of the resulting harms. If legislatures enact statutes precluding imposition of strict liability on sperm banks, the sperm banks which are operated competently and carefully can remain viable enterprises and AID will continue to be a reasonable alternative reproductive procedure.

### III. PROPHYLACTIC MEASURES

#### A. Questions for Law Makers

More than 80,000 women are artificially inseminated with sperm from anonymous donors each year.<sup>105</sup> However, quality standards for sperm, by and large, do not exist. Doctors act as "social gatekeepers," restrained only by their individual consciences—a manner which provides no medical protection.<sup>106</sup> AI should be regulated, but before legislatures promulgate statutes regulating AI, they must resolve difficult questions. These questions include whether the state should: 1) screen donors for genetic defects and infectious diseases; 2) regulate donor eligibility; 3) preserve the donor's anonymity; 4) require physician involvement in the procedure; 5) proscribe the standard of care for sperm banks and fertility physicians; and 6) study the long term effects of AI.

#### 1. Donor Screening

Perhaps one of the easiest questions lawmakers face in regulating AI is whether they should require the screening of semen specimens. Careful

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in contract but would be able to sue for injuries she suffered due to negligence during the insemination. *CUSINE, supra* note 75, at 96.

104. Forty-four states have statutorily precluded liability without fault in blood transfusion cases. *Heirs of Ude C. Fruge v. Blood Servs.*, 365 F. Supp. 1344, 1350-51 (W.D. La. 1973). The *Fruge* court held that the reason to preclude imposing strict liability was "to protect the producers of whole blood and similar products necessary to the protection of health and to the operation of medical and health facilities. It was a declaration of public policy by the legislature . . . . There is no tort liability." *Id.* at 1351.

105. *Gaines, supra* note 6, at 23.

106. Laurie Garrett, *Study Faults Sperm Bank Screening: Inadequate Testing for Disease*, *NEWSDAY* (Nassau & Suffolk Edition), Aug. 10, 1988, at 7. Studies show that 44% of the doctors who *do not* screen sperm for biological problems, such as genetic defects or viral, bacterial, or parasitic contaminations, *do* screen for other factors including intelligence and the physical attributes that recipients seek in their future offspring. *Id.*

screening can establish a complete medical and genetic history of the donor, including blood type and RH factor. This is necessary to prevent the spread of infectious disease and eliminate the risk of genetic defects; it may also reduce the risk of physician and sperm bank liability for wrongful inseminations.

Recent studies indicate that many physicians do not properly screen sperm donors or recipients for a host of infectious diseases, including AIDS.<sup>107</sup> Some doctors fail to screen for other sexually transmitted diseases that can infect or kill a developing fetus such as syphilis, gonorrhea, cytomegalovirus, chlamydia, and herpes.<sup>108</sup> While most doctors question donors about their family history, this is often only a check-list of familial diseases known to the donor.<sup>109</sup> Preventing the spread of genetic disease through AI cannot be accomplished by these means.<sup>110</sup> Research has indicated that many physicians are not qualified to act as genetic counsellors—one of the most important functions in the AI process.<sup>111</sup> This is because the lack of effective medical treatment for infertility allows health care professionals to occasionally exploit infertile couples<sup>112</sup> by misrepresenting their credentials and giving patients the impression that they are infertility specialists.<sup>113</sup>

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107. Statistics from one study showed that only 10% of 1,558 physicians surveyed regularly tested sperm donations for the HIV virus. OFFICE OF TECHNOLOGY ASSESSMENT, *supra* note 4, at 6, 9. A survey conducted by Martin Curie-Cohen et al., questioned 711 physicians who were likely to perform AI. CUSINE, *supra* note 75, at 100. Of the 471 responses, only 379 physicians actually performed AI procedures. *Id.* Disturbing facts emerged from the study. The authors found that most of the physicians were not trained in proper techniques or genetic counselling. *Id.* A 1988 study conducted by the OTA found that more than 11,000 physicians have performed AI on approximately 172,000 women each year. OFFICE OF TECHNOLOGY ASSESSMENT, *supra* note 4, at 8. However, the OTA found that "there are no federal or state regulations aimed at screening sperm donations to protect either the female recipient or the possible offspring." *Id.* Another study surveying 1,500 physicians and the nation's 30 largest sperm banks found that 44% of the doctors fail to follow any of the voluntary guidelines established by medical societies. Garrett, *supra* note 106, at 7. Another 8% of doctors use sperm donations under the assumption that the sperm bank conducted proper screening tests. *Id.* In addition, less than 20% of the doctors follow the guidelines established by the Centers for Disease Control which ensure that donated sperm is not AIDS-contaminated. *Id.* See generally OFFICE OF TECHNOLOGY ASSESSMENT, *supra* note 4 (discussing sperm testing by physicians).

108. *Id.*

109. Garrett, *supra* note 106, at 7.

110. CUSINE, *supra* note 75, at 100.

111. *Id.*

112. COMMITTEE ON GOV'T. OPERATIONS, *supra* note 11, at 26.

113. *Id.* When doctors participate in brief infertility treatment courses and frame their certificates from these courses, patients may receive the false impression that their physician is an infertility expert. *Id.* In effect, couples seeking treatment may be misled about the "efficacy of treatments offered and the expertise of the medical personnel with whom they are consulting." *Id.* at 26.

The failure to screen donors is particularly disturbing considering other scientific capabilities employed in AI. Fertility doctors can manipulate sperm in the lab, test cells to determine sex, and even allow prospective parents to select their child's gender.<sup>114</sup> Computers at some fertility centers profile the donors with hereditary traits such as eye color, hair color, religion, and hobbies.<sup>115</sup> There is also one facility in Escondido, California, called the Genius Sperm Bank, which advertises that it can provide patients with the sperm of Nobel Prize winners, Olympic athletes, and other high achievers.<sup>116</sup> With the ability to perform all of this genetic mastering, it seems ironic that those performing the procedures do not test for simple genetic problems which could result in serious future complications.

Physicians may not screen their donors because most AID practitioners use only medical students or resident physicians as donors.<sup>117</sup> One commentator stated that, "studies show that donors tend to be younger, healthier, and more intelligent than the general population, and that offspring of AID are not at significantly greater risk of genetic defects than the general population."<sup>118</sup> Because there has been no proof that the use of donor sperm has resulted in the birth of genetically defective children or the spread of venereal disease, there may be a reluctance to regulate donor screening.<sup>119</sup>

Currently, only a handful of states require donor screening.<sup>120</sup> More state legislatures should promulgate statutes requiring screening to protect sperm recipients and their offspring. Because there is no federal legislation<sup>121</sup> or

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114. Paula Henniger, *Parents Go Shopping for Genetic Perfection*, S.F. CHRON., July 15, 1990, at 46.

115. *Id.*

116. *Id.*; see also OFFICE OF TECHNOLOGY ASSESSMENT, *supra* note 4, at 10 (reporting the matching of recipient specifications by physicians).

117. Of the 400 practitioners surveyed, 80% nearly always used medical students or resident physicians as donors. Hummel and Talbert, *supra* note 13, at 926; See also CUSINE, *supra* note 75, at 92-93 (noting that 62% of doctors in the United States use medical students or hospital residents as donors).

118. Susan G. Eisenman, *Fathers, Biological and Anonymous, and Other Legal Strangers: Determination of Parentage and Artificial Insemination by Donor Under Ohio Law*, 45 OHIO ST. L.J. 383, 392 (1984). See also Curie-Cohen et al., *supra* note 59, at 588. But see F. Clarke Fraser & R. Allan Forse, *On Genetic Screening of Donors for Artificial Insemination*, 10 AM. J. MED. GENETICS 399, 400-01 (1981) (indicating that there is no reliable evidence that birth defects are not increased in AID children; any increase in defects, however, is not significant).

119. Eisenman, *supra* note 118, at 392. The author posits that medically supervised AID falls within the zone of privacy protected by the Constitution and thus can only be regulated if there is a compelling state interest. The author notes that under *Roe v. Wade*, 410 U.S. 113, 159-64 (1973), the state interest is limited and regulation of unconceived children is probably unconstitutional. *Id.* at 393.

120. See Schatz, *supra* note 9, at 3.

121. The Food and Drug Administration (FDA) is not permitted to regulate AI except when semen is transported interstate. Garrett, *supra* note 106, at 7. This Comment does not

funding for sperm banks,<sup>122</sup> states must undertake a vigorous campaign to establish standards for donor screening.<sup>123</sup>

## 2. Regulating Donor Eligibility

In implementing requirements for screening semen samples, states must also consider whether they will regulate the eligibility of donors. In most cases the physician, not the sperm recipient, selects the donor.<sup>124</sup> To date, most donors have been medical students or resident physicians.<sup>125</sup> Given the exclusivity of this gene pool, some critics claim that these practitioners are making eugenic decisions by deciding to use "superior genes" for donor inseminations.<sup>126</sup> Currently there is no limit as to how many times a donor may deposit sperm into a banking facility. There is also no limit to how many times an individual's sperm can be used to impregnate a woman.<sup>127</sup> The AFS has recommended a limit of ten successful pregnancies per do-

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suggest that the authority to regulate sperm banking facilities should be given specifically to the FDA. It merely suggests that each state take a protective stance and establish guidelines based on those established by the AFS. However, Sen. Albert Gore (D-Tenn.) introduced a bill that suggests that the FDA require sperm banks and physicians to screen semen using procedures similar to those required by blood banks to test for HIV antibodies. Byrne, *supra* note 38, at 895. Currently, the FDA only *recommends* that all sperm donors be tested for HIV antibodies. *Id.* However, it is uncertain whether the FDA would even have the authority to regulate such procedures in the sperm banks. *Id.* The FDA is also attempting to determine how to regulate the individual physicians who perform AI. *Id.*

122. COMM. ON GOV'T. OPERATIONS, *supra* note 11, at 6-7.

123. New York is one of the few states which regulates sperm banking facilities. See, e.g., N.Y. COMP. CODES R. & REGS. tit. 10, § 58-7 (proposed revision 1990). Additionally, the large organizations which monitor sperm banking facilities nationwide have promulgated guidelines. Since 1985, the AATB has discouraged the use of fresh semen. OFFICE OF TECHNOLOGY ASSESSMENT, *supra* note 4, at 10. In 1988, the FDA, in conjunction with the Centers for Disease Control and the AFS, adopted recommendations requiring sperm to be frozen and retested for HIV. *Id.* The FDA recommends a six-month quarantine period and the AATB advises that physicians wait thirteen months before inseminating a woman. *Id.* The AFS followed suit with a similar standard. See Ethics Committee, *supra* note 4, at 12S.

124. One study found that 92% of practitioners never permit the recipient to select the donor, while the remaining 8% allow donor selection only on rare occasions. Annas, *supra* note 20, at 6. About 15% of the doctors use frozen semen obtained from sperm banks; other practitioners use sperm selected by urologists or other personal associates. *Id.*

Even if recipients choose the sperm with which they wish to be inseminated, problems may still arise. For example, health officials in California are investigating claims that eight couples who selected a donor for IVF from a character description allegedly did not receive sperm from the donor they selected, rather they received the sperm of another donor without being informed of the change. *Test-tube Mixup Subject of Investigation*, Aug. 8, 1989, available in LEXIS, Nexis Library, UPI File.

125. Hummel & Talbert, *supra* note 13, at 926; see *supra* note 120.

126. CUSINE, *supra* note 75, at 93.

127. Shrona Foreman, *Risk is Small in Hiding the Identity of Donor*, USA TODAY, Mar. 26, 1990, at 7A.

nor.<sup>128</sup> These guidelines suggest that this limit should be further reduced if the population using the insemination technique represents an isolated subgroup.<sup>129</sup> Such suggestions make it increasingly necessary to have governmental regulation of sperm banks, including record-keeping requirements. These control mechanisms will ensure that sperm mix-ups do not occur and that doctors and sperm banks do not misrepresent relevant data regarding pregnancies and sperm donations.

### 3. *Preserving Donor Anonymity*

Unfortunately, tracking donor data in order to limit the number of successful inseminations per donor necessarily impinges on donor anonymity. Because anonymity encourages donors to contribute, doctors have been unwilling to maintain formal and comprehensive records which might expose the donor to financial liability.<sup>130</sup> Critics claim that donor tracking requirements will have devastating effects on the use of AI.<sup>131</sup> Nevertheless, the AFS guidelines encourage the collection of compatible data on both a regional and national basis.<sup>132</sup> Therefore, states must be cognizant of the competing needs for both record-keeping and donor anonymity when creating legislation governing AI.

Legislatures must determine whether any circumstances justify disclosure of the donor's identity. This is one of the most difficult issues surrounding reproductive technology—the conflict between the donor's constitutional right to privacy and a person's right to know her true genetic, medical, and cultural heritage. Medical ethicists and other experts believe that the scientific community ignores the impact on children conceived through assisted reproduction because of its desire to develop more sophisticated medical techniques.<sup>133</sup> Insistence in the United States on maintaining donor anonymity, and thus protecting them from claims of unfulfilled parental responsibilities or medical harm, is “almost obsessional”—as a result, the interests of the children are given a lower priority.<sup>134</sup> Ethicists want detailed infor-

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128. American Fertility Soc'y, *supra* note 30, at 4S.

129. *Id.*

130. Ethics Committee, *supra* note 4, at 76S.

131. Timothy J. McNulty, *Dilemma is Born: Donor's Rights vs. Children's*, CHI. TRIB., Aug. 10, 1987, at C1, C10; *see also*, Spano, *supra* note 56 (explaining a California judge's refusal to disclose a sperm donor's name because the donor's right of privacy outweighed the recipient's legal claim that the donated sperm was infected with a virus).

132. Ethics Committee, *supra* note 4, at 76S.

133. McNulty, *supra* note 131, at C1. *See generally* BARAN & PANNOR, *supra* note 10. In interviews, sperm donors, donor offspring, husbands, and wives in donor-insemination families have indicated serious problems which, considered in retrospect, would prevent the majority of them from participating in AI in the future. *Id.*

134. McNulty, *supra* note 131, at C10 (quoting Boston ethicist George Annas from a study



mation about the background of donors to be made available in order to track inherited diseases such as cystic fibrosis, diabetes, Tay-Sachs, and sickle-cell anemia.<sup>135</sup> They are also concerned about "predispositions toward illnesses that seem to run in families and affect people at different times of life, from teenage alcoholism to heart disease, certain forms of cancer[,] and Alzheimer's disease."<sup>136</sup> Legislatures must decide whether these reasons warrant disclosure of the donor's identity.

Arguments for and against disclosure have been made by comparing AI to natural procreation. Proponents of disclosure argue that while natural conception involving two consenting sexual partners risks genetic defects, the risk becomes much greater when the source of the sperm is unknown. They claim that "screening is no more an invasion of privacy than contact tracing in the treatment of venereal disease, or income tax and public health records, or compulsory fluoridation of the water, or the age-old codes of consanguinity."<sup>137</sup>

Opponents of disclosure question the existence of a donor's implied duty to supply productive semen and argue that these same issues are not even considered in personal relations and natural conception.<sup>138</sup> Parents of adopted children and donors of AID are screened and selected much more carefully than natural parents, a result which seems logically ridiculous to some.<sup>139</sup> The opponents of screening patients and maintaining records also object on the premise that it violates the parties' right to privacy.<sup>140</sup> Some even claim that there is a right *not* to know.<sup>141</sup>

American courts have addressed some of these issues in adoption cases. Adoption advocates seek similar background information about a child's biological identity.<sup>142</sup> Roots, they argue, are important in a society fragmented by divorce and remarriage, in which unwed teenager mothers have little or no contact with their children's fathers, and in which there is a growing sense of instability.<sup>143</sup> These advocates argue that the need for donor anonymity does not justify ignoring the heritage of children conceived

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coauthored by Dr. Sherman Elias on reproductive technologies). See Beth A. Krier, *King of the Anonymous Fathers; Sperm Donor May Have 40 Children He'll Never Know*, L.A. TIMES, Apr. 21, 1989, at V10 (discussing multiple donor who believes there should be a registry listing the sperm recipients and donors so that children may learn their true heritage).

135. McNulty, *supra* note 131, at C1.

136. *Id.*

137. FLETCHER, *supra* note 26, at 183.

138. *Id.* at 182.

139. *Id.*

140. *Id.* at 183.

141. *Id.*

142. See generally CUSINE, *supra* note 75, at 83-85.

143. McNulty, *supra* note 131, at C1.

through AI.<sup>144</sup> Many foreign legislative bodies have expressed similar sentiments.<sup>145</sup>

Disclosure of the donor's identity also implicates the confidential doctor/patient relationship. At the present time, confidentiality is not a vexing issue because most sperm banks and fertility doctors do not maintain adequate records.<sup>146</sup> However, if regulations mandating record-keeping and access by the recipient and her children are enacted, liability for disclosure may become a problem.

Courts have permitted patients to recover against their physicians for breach of the patient's confidentiality when the information released was confidential and wrongfully disclosed.<sup>147</sup> Given the donor's reliance on the sperm banks for his anonymity, the same liability should arise whether a doctor or lay person performs the procedures. According to the American Medical Association's ethical principles, physicians may reveal confidences entrusted to them by their patients only when: 1) the doctor is required by law to disclose the information; 2) disclosure is necessary to protect the welfare of the individual or society; or 3) the patient authorized the disclosure.<sup>148</sup> In addition to the ethical limitations, disclosure by the physician may be legally prohibited. Statutes may preclude disclosure to the recipient or her children.<sup>149</sup> Additionally, although some state statutes provide for filing information about AID with state authorities, access to this information can only be gained by court order.<sup>150</sup> These statutes create a privilege for the information; thus a doctor must keep his involvement in AID cases

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144. *Id.* See generally Joan H. Hollinger, *From Coitus to Commerce: Legal and Social Consequences of Noncoital Reproduction*, 18 U. MICH. J.L. REF. 865, 922-23 (1985). Research has raised questions about the appropriateness of assuring confidentiality to sperm, egg, or embryo donors.

Nearly all of a large group of sperm donors interviewed ten to twenty years after their donations indicate that they are curious about their genetic offspring, have felt some regret about their earlier requests for anonymity, and are concerned about the possibility that the children may experience psychological distress as a consequence of being unable to have any contact with their genetic father's families.

*Id.* at 922 (citations omitted). In addition, parents who raise AID children report considerable tension when deciding whether to discuss with their children the history behind their conceptions. *Id.* at 922-23. These children, most of whom are 18 or older, have reported a strong desire to know the identity of their genetic fathers. *Id.* at 923.

145. See *infra* note 193 and accompanying text.

146. See OFFICE OF TECHNOLOGY ASSESSMENT, *supra* note 4, at 10-11.

147. See Piorkowski, *supra* note 12, at 192.

148. CUSINE, *supra* note 75, at 74.

149. See, e.g., 10 N.Y. COMP. CODE R. & REGS. tit. 10, § 58-7.8 (proposed revision 1990) (prohibiting the disclosure of information about AID.) See also, CUSINE, *supra* note 75, at 75.

150. See, e.g., COLO. REV. STAT. § 19-6-106 (1986); CONN. GEN. STAT. ANN. § 45-69h (West 1981); KAN. STAT. ANN. § 23-128 (1971); OKL. STAT. ANN. tit. 10, § 553 (West 1981).

confidential.<sup>151</sup> An unauthorized disclosure could lead to a physician being suspended from practice.<sup>152</sup> Finally, courts can prevent a threatened unauthorized disclosure by remedies within the province of civil law.<sup>153</sup>

Legislatures can resolve the donor confidentiality issue by requiring record-keeping of donor data and allowing the sperm recipient and her offspring access to all of the information except the donor's identity. In the adoption context, one court has held that an adopted child who requested information about her biological parents had the right to the information, but not to the identity of her natural parents.<sup>154</sup> Similarly, the guidelines promulgated by the AFS request that doctors maintain records to monitor the donor insemination process and trace the medical and genetic background of the donor and recipient but not disclose personal information about the donor.<sup>155</sup>

#### 4. *Requiring Physician Involvement*

Another issue state legislatures must consider is whether to allow only licensed physicians to perform all future AIs. Usually a person with medical training performs the insemination, although this is not always the case.<sup>156</sup> Approximately one-half of the AID statutes in the United States "are premised on the assumption that a physician or someone under a physician's supervision will perform the insemination."<sup>157</sup> Although these statutes presume a physician will be present and many commentators have stressed this need in hopes of reducing the chance of spreading infectious disease or the risk of negligent performance, there is no guarantee of physician involvement in AI. Statutes in four states specifically mandate that a physician perform the insemination.<sup>158</sup> Georgia's statute is the most comprehensive,

151. See CUSINE, *supra* note 75, at 75.

152. *Id.* at 75.

153. *Id.*

154. *Chattman v. Bennett*, 393 N.Y.S.2d 768, 768 (Sup. Ct. App. Div. 1977).

155. See generally, Am. Fertility Soc'y, *supra* note 30.

156. Lorio, *supra* note 1, at 1649; see also Victor W. Weedn, *Reproduction Patients*, in LEGAL MEDICINE 232, 238 (1988) (explaining that most states require that a physician perform AI and that performance of the procedure by nonphysicians represents the unauthorized practice of medicine).

157. Ethics Committee, *supra* note 4, at 11S; see ALA. CODE § 26-17-21(a) (1986); ALASKA STAT. § 25.20.045 (1991); CAL. CIV. CODE § 7005 (West 1983); COLO. REV. STAT. § 19-6-106 (1986); IDAHO CODE § 39-5402 (1985); ILL. ANN. STAT. ch. 40, para. 1453 (Smith-Hurd Supp. 1991); MINN. STAT. ANN. § 257.56 (West Supp. 1989); MONT. CODE ANN. § 40-6-106 (1991); NEV. REV. STAT. ANN. § 126.061 (Michie 1986); N.Y. DOM. REL. LAW § 73 (McKinney 1988); VA. CODE ANN. § 64.1-7.1 (Michie 1991); WASH. REV. CODE ANN. § 26.26.050(1) (West 1966); WIS. STAT. ANN. § 891.40(1) (West Supp. 1991); WYO. STAT. § 14-2-103(a) (1986).

158. Ethics Committee, *supra* note 4, at 11S; see ARK. CODE ANN. § 9-10-102 (Michie

making the performance of AID without a medical license a felony which carries a maximum sentence of five years.<sup>159</sup>

Physicians need to be involved in AI prior to insemination so that they can carefully screen donors before accepting their sperm.<sup>160</sup> The requirement that a physician be present is premised on the belief that a physician's knowledge and oversight will reduce the risk of negligent performance and the transmission of infectious diseases.<sup>161</sup> The presence of a physician also creates a formal, documented structure for the insemination which reduces the possibility of misunderstandings between the recipient and donor.<sup>162</sup> Nevertheless, many critics oppose physician involvement in the process.<sup>163</sup> One argument is that it offends a woman's privacy and reproductive autonomy.<sup>164</sup> Physician involvement may also impose burdensome costs on some women and interfere with their desire to conduct the procedure in a comfortable environment.<sup>165</sup> Furthermore, physician participation interferes with the woman's ability to personally choose the donor.<sup>166</sup>

### 5. Negligence Questions

In addition to the difficult issues of physician involvement, donor anonymity, eligibility, and screening, legislatures must decide the duty of care to which sperm banks and fertility doctors will be held. Each state should establish guidelines that address the duty owed, the breach of that duty, causation, and damages for harm resulting from negligent insemination, including claims for wrongful birth and wrongful life.<sup>167</sup> Legislatures must also decide whether sperm banking facilities have a duty to warn third parties of possible exposure to HIV infection and whether they have a duty to disclose the

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1991); GA. CODE ANN. § 43-34-42 (Michie Supp. 1991); OKLA. STAT. ANN. tit. 10, § 553 (West Supp. 1987); OR. REV. STAT. § 677.360 (1991).

159. GA. CODE ANN. § 43-34-42 (Michie 1991).

160. Lorio, *supra* note 1, at 1651.

161. *Id.* at 1649. Legislatures must also decide what sanctions to impose on unlicensed individuals and clinics who perform AI. *Id.* at 1650. Lorio asserts: "Criminalizing the performance of artificial insemination donor without medical supervision would be state action, and could elicit the constitutional argument of denial of equal protection, which the state would have to rebut by establishing a compelling state reason for its action." *Id.*

162. *Jhordan C. v. Mary K.*, 224 Cal. Rptr. 530, 535 (Ct. App. 1986)

163. *Jhordan C.*, 224 Cal. Rptr. at 535; see George P. Smith, II., *A Close Encounter of the First Kind: Artificial Insemination and an Enlightened Judiciary*, 17 J. FAM. L. 41 (1978).

164. *Jhordan C.*, 224 Cal. Rptr. at 535. See also FLETCHER, *supra* note 26, at 182-83. Fletcher believes that parents of adopted children and donors of AID are screened and selected much more carefully than natural parents; the objection to the screening is that it violates a right to privacy.

165. *Id.*

166. *Id.*

167. See ANDREWS, *supra* note 68, at 167, 192-93.

risk of wrongful insemination. Nonbinding guidelines established by the AFS and the AATB provide the states with a model to consult in drafting legislation. These guidelines suggest that sperm banks and persons performing AI should be held to standards similar to those imposed on doctors in other circumstances,<sup>168</sup> such as a physician's duty to prevent the spread of infectious or contagious disease.<sup>169</sup>

#### 6. *The Long-Term Effects of AI*

Since AID first became an acceptable means of reproduction, very few studies have evaluated the outcome and consequences of the procedure.<sup>170</sup> Notably absent are long-term follow up studies of families with a child or children born as a result of artificial conception.<sup>171</sup> Many proponents of the use of third party donors ignore what happens after a baby is born.<sup>172</sup> In contesting the use of donors, critics challenge the assumption that why and how one gets a baby does not affect what happens afterwards.<sup>173</sup> They argue that "[t]his may be true of hens or cows, but it is hardly true of complex, thinking, emoting, imaginative human beings functioning within social systems."<sup>174</sup> Since the first "ice-babies"<sup>175</sup> are reaching the age when they are likely to question their background, legislation requiring consideration of the postnatal effects on AID children is as important as regulating the AI process itself. Legislation addressing this need will provide a complete analysis of the psychological, emotional, and ethical repercussions of this technological form of reproduction.

#### B. *Proposed Guidelines*

There is an urgent need for the creation and clarification of a legal frame-

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168. Ethics Committee, *supra* note 4, at 74S.

169. Piorkowski, *supra* note 12, at 176 (discussing the moratorium placed on federal funding for fetal research).

170. Fraser & Forse, *supra* note 118, at 400; see also BARAN & PANNOR, *supra* note 10 (explaining that interviews of sperm donors, donor offspring, husbands, and wives found a "morass of legal, emotional[,] and societal complexities").

171. GIESEN, *supra* note 3, at 631; see also BARAN & PANNOR, *supra* note 10.

172. Sidney Callahan, *The Ethical Challenge of the New Reproductive Technology*, in MEDICAL ETHICS 29 (John F. Monagle ed., 1988). But see *Alternative Reproductive Technologies: Implications for Children and Families: Hearing Before the Select Committee on Children, Youth and Families*, 100th Cong., 1st Sess. 139 (1987). Lori B. Andrews testified: "in the one area of alternative reproduction where there have been studies, that with respect to artificial insemination by donor, the research shows that the children born through these techniques are thriving physically, emotionally[,] and intellectually." *Id.*

173. Callahan, *supra* note 172, at 29-30.

174. *Id.* at 30.

175. GIESEN, *supra* note 3, at 631.

work within which contemporary efforts to artificially produce or procure children may occur. As one commentator noted:

[It is very difficult] and [yet] essential, . . . to create a regulatory apparatus that would not place the government in the business of controlling human reproduction but which would . . . 1) facilitate procreative choices, 2) minimize the risk of harm to the participants, . . . and 3) provide some mechanism for assuring and improving the quality of the services offered by doctors, lawyers[,] and other intermediaries.<sup>176</sup>

In order to decrease the risk of transmitting infectious diseases through AI, the AFS has issued a set of guidelines for donor insemination clinics and physicians.<sup>177</sup> The purpose of the guidelines is to improve donor selection and decrease the potential hazard of transmitting infectious disease by employing proper quarantine procedures and using frozen semen.<sup>178</sup> The AFS recommends: 1) screening sperm for genetic abnormalities and sexually transmitted diseases; 2) quarantining semen for 180 days and retesting it for the AIDS virus thereafter; 3) eliminating the use of fresh semen; 4) accepting only donors under age fifty; 5) informing couples who seek donor insemination of the possible adverse emotional and psychological consequences; 6) having the couple, or the patient if she is single, sign a consent form; 7) evaluating the husband or male partner, the female recipient, and the donor; 8) examining semen samples for two or three days prior to the insemination to ensure that they are safe; 9) reducing monetary incentives so that financial gain is not the primary factor motivating the donor; 10) establishing rules that limit donor use; and 11) maintaining confidential records of donors, including genetic workups and other nonidentifying information.<sup>179</sup> The AFS also suggests that records that exclude the name of the donor be provided to the recipient and the resulting offspring upon request.<sup>180</sup>

The nonbinding AFS guidelines provide a suitable starting point for state promulgated sperm bank regulations. In addition to the points covered by the AFS guidelines, legislation should: establish a method for monitoring the continued viability of semen samples; define the circumstances warranting notification of the donor; establish methods, fees, and time limits for sperm storage; and mandate specific requirements for record-keeping.<sup>181</sup> Further suggestions for lawmakers to consider include: 1) federal encouragement of

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176. Hollinger, *supra* note 144, at 881-82.

177. See generally American Fertility Soc'y, *supra* note 30.

178. *Id.* at 1S.

179. *Id.* at 1S-4S.

180. *Id.* at 4S.

181. For additional suggestions, see generally *Model Human Reproductive Technologies and Surrogacy Act*, 72 IOWA L. REV. 943 (1987). See also Lorio, *supra* note 1 (discussing

clinics to gather and provide information regarding success rates; 2) extension of state consumer protection laws to selected infertility services; 3) examination of the advertisement of success rates at various clinics by the Federal Trade Commission and, if necessary, establishment of standardized reporting; and 4) establishment of a national registry to provide more comprehensive medical and psychological information, including nonidentifying genetic records, about the effects of assisted conception procedures on the families who used them.<sup>182</sup>

### C. Foreign Solutions

Outside the United States, other countries have also struggled with the complexities of assisted reproduction. Recent legislative enactments in England may influence state legislatures that are considering the anonymity issue in the context of AI. Borrowing from Swedish law,<sup>183</sup> England's Parliament enacted legislation that provides for the identification of genetic parents and disclosure of a sperm donor's identity.<sup>184</sup> Under the controversial Human Fertilization and Embryology Bill,<sup>185</sup> the statutory licensing authority will maintain records of all children conceived with donated eggs or sperm.<sup>186</sup> Medical details will also be released to adopted children, upon reaching age eighteen, that will enable them to learn about inherited conditions and avoid possible sibling incest.<sup>187</sup> Although some United States commentators predict a decrease in donors upon the enactment of legislation requiring the maintenance of such data, this does not appear to have happened in Sweden, where the identity of the donor is also disclosed.<sup>188</sup>

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guidelines for legislation); Rice, *supra* note 47 (recommending enactment of a comprehensive AID statute).

182. COMMITTEE ON GOV'T OPERATIONS, *supra* note 11, at 30-31.

183. Sweden has taken controversial measures by legislating that the offspring of AID have a right to know the identity of their father; consequently an order was issued to destroy all anonymous semen stored in sperm banks. NOBLE, *supra* note 69, at 278.

184. *Human Fertilization and Embryology Act finally Releases Statute Book*, BULL. MED. ETH., Nov. 1990, at 13.

185. *Id.* see also, Roz Morris, *Dilemma for Egg Donors*, DAILY TELEGRAPH, June 19, 1990, at 15. The names of sperm donors are in files of a new licensing authority created to regulate the practices of infertility clinics. *Id.* The main objective behind the creation of these files is to provide children who discover that they have a genetic disease with the ability to track down the donor to advise them of the risk of passing the condition on to their own offspring. *Id.* at 18. See also Patricia W. Davies, *Sperm Donor Change 'Threatens Childless'*, INDEP., June 1, 1990, at 7.

186. Davies, *supra* note 185, at 7. The government will not release the donor's identity at this stage, but wants the option to do so after determining whether release will be detrimental to any of the parties involved. *Id.*

187. *Id.*

188. See, e.g., Pat Bentley, *Right of Children Born From DI*, INDEP., June 6, 1990, at 20

Other countries have addressed the donor anonymity issue. In 1980, the Australian Parliament enacted uniform legislation on the status of AID children.<sup>189</sup> This legislation provides that a "husband who consents to his wife undergoing AID should be deemed to be the father of any child born as a result, and that the sperm donor should have no rights or liabilities in respect of the child and *vice versa*."<sup>190</sup> Australia is one of the few countries that has taken an anticipatory stance by enacting AID legislation. In 1984, South Wales passed the Artificial Conception Act<sup>191</sup> addressing the paternity and legal status of donor insemination and in vitro fertilization (IVF) children born as a result of donated sperm.<sup>192</sup> In the same year, Victoria also passed two pieces of legislation, The Status of Children (Amendment) Act<sup>193</sup> and the Infertility (Medical Procedures) Act.<sup>194</sup> The Infertility Act requires recording the incidence of IVF and the use of embryos and proscribes that these records be maintained at a central register at the Health Department.<sup>195</sup> Although this regulation does not specifically apply to AID, the recording practice has been extended to cover AID while specific regulations are drafted.<sup>196</sup> Additionally, Australia bans the sale of human tissues, including sperm, and outlaws the mixing of sperm in AID.<sup>197</sup> The infertility legislation establishes a system of state regulation of AID, IVF, freezing and experimenting on embryos, record-keeping, and requires counseling of par-

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(letter to the editor). However, other sources in Sweden show that the number of babies born following DI dropped by about 20%. Davies, *supra* note 185, at 7. (estimating that laws requiring the disclosure of donor identity have reduced the number of babies born through AID in Sweden over a five year period by 800; an equivalent figure in Britain over a similar period is approximately 3,000).

189. CUSINE, *supra* note 75, at 203.

190. *Id.* at 202.

191. ONTARIO LAW REFORM COMM'N, REPORT ON HUMAN ARTIFICIAL REPRODUCTION AND RELATED MATTERS 389 (1985).

192. NOBLE, *supra* note 69, at 272. The Act provides that a husband consenting to AID is irrebuttably presumed to be the father for all purposes. *Id.* The husband's consent is presumed but may be rebutted. *Id.* There is an irrebuttable presumption that the donor is not the father. *Id.* The Act further provides that the terms "husband" and "wife" are partners of the opposite sex who live together on a bona fide domestic basis. See CUSINE, *supra* note 75, at 204.

193. ONTARIO LAW REFORM COMM'N, *supra* note 191, at 383; see also CUSINE, *supra* note 75, at 203. This Act "creates a presumption that the husband is the father of the child and it deals also with the status of children born after egg donation or embryo donation." *Id.* An irrebuttable presumption also exists that the woman giving birth is the child's mother and that the egg donor is not. *Id.*

194. ONTARIO LAW REFORM COMM'N, *supra* note 191, at 383; see also CUSINE, *supra* note 75, at 203.

195. CUSINE, *supra* note 75, at 203.

196. *Id.*

197. SHERMAN ELIAS & GEORGE J. ANNAS, REPRODUCTIVE GENETICS AND THE LAW 236 (1987).



ticipants.<sup>198</sup> Because of these legislative efforts, Australia is considered a leader in assisted reproduction legislation—other countries have been slow to adopt similarly progressive measures.

Canada has no national legislation regarding assisted reproduction, but the territorial legislatures of British Columbia, Alberta, and Saskatchewan have examined AI issues.<sup>199</sup> Additionally, the territories of Yukon and Quebec have enacted legislation that specifically addresses AID.<sup>200</sup> The Yukon's legislation protects the donor, and Quebec's legislation legitimizes the child and ensures the social father's rights.<sup>201</sup> In Italy and Switzerland the practice of AID is illegal, and Poland refuses to recognize the legitimacy of the procedure.<sup>202</sup> In France, the practice is deliberately not recognized by the law and left to the persons concerned.<sup>203</sup> Germany does not regulate AI; responsibility is placed on physicians who are generally reluctant to offer the service because of potential liability.<sup>204</sup> Throughout the rest of the world there is little evidence of legislative activity concerning AID.<sup>205</sup>

#### IV. CONCLUSION

Modern technology has enabled medicine to make many impressive and breathtaking achievements; however, the corresponding legislative action has lagged far behind.<sup>206</sup> While ethicists and medical and legal scholars have extensively contemplated the repercussions of assisted reproductive technology, government bodies have either avoided the issues altogether or only partially addressed them. Consequently, courts are forced to resolve problems arising out of AI without formal guidance from state legislatures and by using incomplete analogies to other areas of the law in an effort to reach just and equitable solutions.

Sperm banks throughout the country have operated virtually free of regulation at both the federal and state levels for years.<sup>207</sup> While regulating sperm banks may be difficult because of financial constraints<sup>208</sup> or a lack of

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198. *Id.*

199. CUSINE, *supra* note 75, at 201. In Canada, gamete banks that buy and sell sperm operate under state license; payments from users may cover costs and result in profits. ELIAS & ANNAS, *supra* note 197, at 236.

200. NOBLE, *supra* note 69, at 274.

201. *Id.*

202. *Id.* at 279.

203. *Id.* at 277.

204. *Id.* at 277-78.

205. CUSINE, *supra* note 75, at 207.

206. GIESEN, *supra* note 3, § 52, at 674.

207. Wadlington, *supra* note 29, at 468.

208. Ethics Committee, *supra* note 4, at 8S.

qualified individuals who can inspect the facilities, the problems that are beginning to appear are too severe to remain unaddressed.<sup>209</sup> If medical practitioners continue to eagerly assist childless couples overcome their plight through artificial conception, lawmakers must be willing to protect the rights of the parties involved.

The absence of any regulatory framework means that techniques and practices vary widely among AID practitioners.<sup>210</sup> As a result, state legislation is warranted to regulate sperm banking facilities and operational procedures. A critical need exists for uniform public health standards which will provide consistency within sperm banking facilities. If the states do not act, the federal government should impose some regulation to provide guidance in this area. To allow operations to continue unregulated risks the spread of infectious disease and genetic defects and impairs not only the rights of the parties involved but also the rights of society at large.

Whatever one may conclude about the result reached in the New York controversies<sup>211</sup> or in any other case, it is evident that the legal system must address the ramifications of today's reproductive technology and begin thinking about the technology of the future. The inevitable involvement of the legal system should be shaped by thoughtful legislative action rather than by the ad hoc responses of judges, who must create law by choosing among unsatisfactory alternatives.

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209. *Id.*

210. *Id.* at 120.

211. See discussion, *supra* notes 63 and 64.

